

UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

ASSOCIATED TILE CONTRACTORS OF  
NORTHERN CALIFORNIA, INC.<sup>1</sup>

Employer

and

TILE SETTERS AND FINISHERS UNION OF  
NORTHERN CALIFORNIA

Case 20-RC-17578

Petitioner

and

BRICKLAYERS AND ALLIED CRAFTWORKERS  
UNION LOCAL NO. 3, AFFILIATED WITH THE  
INTERNATIONAL UNION OF BRICKLAYERS AND  
ALLIED CRAFTSMEN, AFL-CIO,<sup>2</sup>

Intervenor.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,<sup>3</sup> the undersigned finds:

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The Intervenor's name appears as amended at the hearing.

<sup>3</sup> After the hearing closed, the parties submitted a joint stipulation to be included in the record. This stipulation is hereby received into the record as Joint Exhibit 3.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The record reflects that the Employer is a multi-employer bargaining group consisting of four general employer-members: Fischer Tile & Marble, Inc., Sherman-Loehr Custom Tile, Natural Stone Design and Latz Tile Company. With the exception of Latz Tile Company, located in Lodi, California, all of the employer-members of the Association are located in Sacramento, California. The parties stipulated, and I find, that the employer-members of the Association are construction industry contractors. The parties further stipulated, and I find, that during the calendar year ending December 31, 1999, at least one of the general members of the Association, specifically Fischer Tile and Marble, Inc., purchased and received at its Sacramento, California, facility, goods valued in excess of \$50,000 from other enterprises located within the State of California, each of which other enterprises had received those goods directly from points outside the State of California. Based on the parties' stipulation to such facts, it is concluded that the Association is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this matter.

3. The parties have stipulated, and I find, that the Petitioner and the Intervenor are each a labor organization within the meaning of the Act.

4. The Intervenor contends that there is a contract bar to the instant petition and that the petition should be dismissed. The Petitioner takes the opposite position.

By its amended petition, the Petitioner seeks to represent a unit comprised of the following employees of the employer-members of the Employer: All journeymen and apprentice tile setters and tile finishers, patch persons, tile improvers, and pre-apprentice trainees employed

by general members of the Employer, performing work in the counties of Butte, Colusa, El Dorado, Glenn, Lassen, Modoc, Nevada, Placer, Plumas, Sacramento, Shasta, Sierra, Sutter, Tehama, Yolo, and Yuba, California; excluding all other employees of general members of the employer, clerical workers, guards and supervisors as defined in the Act. The record reflects that the petitioned-for unit is co-extensive with that currently represented by the Intervenor as described below.

The record contains a Certification of Representative dated November 5, 1990, in Case 20-RM-2749, certifying Bricklayers and Allied Craftsmen Local Union No. 29, as the collective-bargaining representative of the employees of the Employer in the following unit:

All journeymen and apprentice tile setters and tile finishers, patch persons and non-certified journeymen employed by general members of the Employer; excluding all other employees of general members of the Employer, including clerical workers, guards and supervisors as defined in the Act.

The parties stipulated, and I find, that the Intervenor herein is a successor to Bricklayers and Allied Craftsmen Local Union No. 29.

The record also contains a collective-bargaining agreement (herein called the Agreement or the BAC 29 Agreement) between the Intervenor and the Employer effective as of the first day of April 1997, to and including midnight March 30, 2000. By its terms, the Agreement applies to “all work of the Tile Layers and Finishers as hereafter defined, in the counties of Butte, Colusa, El Dorado, Glenn, Lassen, Modoc, Nevada, Placer, Plumas, Sacramento, Shasta, Sierra, Sutter, Tehama, Yolo, and Yuba, State of California.”

The petition in the instant case was filed on January 31, 2000.<sup>4</sup> The record reflects that on Friday, January 28, the Petitioner's representative, John Zehm, appeared at the Board's Regional Office and attempted to file the instant petition. However, he was told by the Board Agent who met with him, that he should not file the petition on that date. Rather, he was told to prepare eight separate decertification and representation petitions (one for each general employer-member of the Association and each non-member employer signatory to the Agreement) and file them in the Regional Office on Monday, January 31. When Zehm asked whether there would be a timeliness problem if the petitions were filed on that date, the Board Agent assured him that the petitions would be timely if filed on January 31. In accordance with the Board Agent's instructions, Zehm returned to the Board's Regional Office on January 31, with the sixteen petitions. On this occasion, however, he met with a supervisory Board Agent and ultimately filed the single representation petition in the instant case.

Analysis. As indicated above, the Intervenor contends that there is a contract bar to this proceeding while the Employer and the Petitioner take the opposite position. As a general rule, representation petitions filed more than 60 but not more than 90 days before the terminal date of a collective-bargaining agreement will be considered timely. Petitions filed during the 60-day insulated period will be dismissed as untimely. As a result, to be timely, all petitions must be on file with the Board at least 61 days prior to the termination of the collective-bargaining agreement. See *Deluxe Metal Furniture Company*, 121 NLRB 995, 1000-1001 (1958); *Electric Boat Division*, 158 NLRB 956 (1966); *National Cash Register Co.*, 201 NLRB 846 (1973). This 60-day period is strictly construed and petitions filed on the 59<sup>th</sup> day are generally dismissed.

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<sup>4</sup> All dates hereafter refer to calendar year 2000 unless otherwise indicated.

*Brown Company (KVP Division)*, 178 NLRB 57 (1969). Accord: *Bob's Big Boy Family Restaurant v. NLRB*, 625 F.2d 850, 851, 104 LRRM 3169, 3170 (9<sup>th</sup> Cir. 1980).

There is an exception to this general rule, however, where a petitioner relies on the erroneous advice of a Board Agent and this reliance results in the untimely filing of a petition. Thus, in *Vanity Fair Mills, Inc.*, 256 NLRB 1104, 1106 (1981), the Board reinstated a petition that was otherwise untimely filed, where a petitioner had reasonably followed the erroneous advice and instructions given to it by a Regional Office in filing the decertification petition therein. I find that the instant case falls squarely within this exception. On January 28, the Petitioner herein timely appeared at the Regional Office to file the instant petition but was prevented from doing so until January 31 due to erroneous instructions by the Regional Office. Accordingly, while the petition would otherwise be deemed untimely, I find that under the unusual circumstances presented herein, it is timely filed. Accordingly, I decline to dismiss the petition as untimely.

5. The Petitioner seeks to include in the petitioned-for unit, employees working in all the counties listed in the current collective-bargaining agreement between the Intervenor and the Employer. The Employer contends that the geographic scope of the unit should be expanded to include wherever employees of its employer-members perform work. The only evidence offered by the Employer in support of its contention in this regard is that employees of one of its employer-members, Fischer Tile & Marble, Inc., has on at least one occasion performed work in Stockton and Modesto, California, outside of the geographic jurisdiction of the Agreement, and that such work had been covered by the Agreement. The record does not reflect how often this practice has occurred or whether the same practice was followed by any of the other employer-

members of the Employer. As noted above, the Intervenor also has a collective-bargaining agreement with a different multi-employer association that covers other counties in Northern California, and at least one of the employer-members of the Employer (not identified herein) is a member of both associations. Given that the Petitioner is seeking to represent the same unit as that historically represented by the Intervenor, and in which there is established collective bargaining history, I find that the petitioned-for unit is an appropriate unit.

The Intervenor also contends that the employees of Latz Tile Company (herein called Latz) should not be included in the unit because Latz was not a member of the Employer at the time the Intervenor's predecessor was certified by the Board in Case 20-RM-2749, and because Latz was not a member of the Employer at the time the Agreement was executed. The Employer takes the position that employees of Latz should be included in the unit. The position of the Petitioner is not clear from the record.

The record contains a copy of the membership application of Latz to join the Employer dated April 29, 1999. The record also contains a copy of the signature page from the Agreement which is signed by Latz, dated December 9, 1998, by which Latz agreed to be bound by the terms of the April 1, 1997, to March 31, 2000, Agreement between the Association and the Intervenor. The record reflects that as of the time of the hearing in this case, Latz had not requested to withdraw from membership in the Employer. Based on such evidence, I find that Latz is an employer-member of the Employer and that the employees of Latz are properly included in the unit.

Accordingly, I find that the following unit is an appropriate unit for collective bargaining purposes:

All journeymen and apprentice tile setters and tile finishers, patch persons, tile improvers, and pre-apprentice trainees employed by general members of the Association, performing work in the counties of Butte, Colusa, El Dorado, Glenn, Lassen, Modoc, Nevada, Placer, Plumas, Sacramento, Shasta, Sierra, Sutter, Tehama, Yolo, and Yuba, California; excluding all other employees of general members of the Employer, clerical workers, guards and supervisors<sup>5</sup> as defined in the Act.

#### DIRECTION OF ELECTION <sup>6</sup>

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.<sup>7</sup> Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are all employees in the unit (1) if they have been employed for 30 working days or more within the twelve months preceding the eligibility date for the election, or (2) if they have had some employment in those twelve months or have been

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<sup>5</sup> The parties stipulated, and I find, that superintendents should be excluded from the unit as statutory supervisors.

<sup>6</sup> The Employer and the Petitioner contend that the standard eligibility formula should be applied in this case rather than the *Daniel* eligibility formula (as set forth in *Daniel Construction Company, Inc.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), which is generally applicable to all construction industry elections. The Intervenor takes the position that the *Daniel* formula should be utilized to determine voter eligibility in this case.

As noted above, the parties stipulated, and I find, that the employer-members of the Employer are construction industry contractors. In *Steiny and Company*, 308 NLRB 1323 (1992), the Board held that the *Daniel* formula is applicable to all construction industry elections -- regardless of whether the employer involved hires on a project-by-project basis or has a stable group of employees. Accordingly, as the parties stipulated that the employer-members of the Employer are construction industry employers and have not stipulated to the use of another formula, it is concluded that the *Daniel* formula, as modified by *Steiny and Company*, *supra*, must be applied in this case.

<sup>7</sup> The Intervenor contends that the election herein should be conducted by mail ballot while the Employer and the Petitioner take the position that the election should be conducted by manual balloting. As the record evidence

employed for 45 working days or more within the twenty-four month period immediately preceding the eligibility date. Also eligible are employees engaged in an economic strike which commenced less than twelve months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period or prior to the completion of the last job for which they were employed, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than twelve months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **TILE SETTERS AND FINISHERS UNION OF NORTHERN CALIFORNIA** or **BRICKLAYERS AND ALLIED CRAFTWORKERS UNION LOCAL NO. 3, AFFILIATED WITH THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, AFL-CIO.**

#### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with *them*. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision,

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in not sufficient to determine this issue, an administrative determination will be made as to the appropriateness of a mail ballot election subsequent to the issuance of this decision.

three (3) copies of an election eligibility list containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Region 20 Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103-1735, on or before March 16, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 23, 2000.

DATED at San Francisco, California, this 9<sup>th</sup> day of March, 2000.

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